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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1285

JOHN P. WOOD, et al.,
Petitioners,

vs.

PEGGY STRICKLAND, a Minor, by Mr. and Mrs. Virgil Justice, Her Parents and Next Friends; VIRGINIA CRAIN, a Minor, by Doris Crain, Her Mother and Next Friend,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

CITATIONS TO OPINIONS BELOW

The September 29, 1972 decision of the United States District Court for the Western District of Arkansas, Fort Smith Division, is reported at 348 F.Supp. 244 (W.D. Ark. 1972) and is set forth as Appendix V in the Petition for a Writ of Cer-

tiorari, page A-15. The August 29, 1973 opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Strickland v. Inlow*, 485 F.2d 186 (8th Cir. 1973) and is set forth as Appendix I to the Petition for a Writ of Certiorari, page A-1. The opinion of three Judges of the Court of Appeals dissenting from the denial of the Petition for Rehearing En Banc is reported at 485 F.2d 191 and is set forth as Appendix III to the Petition for a Writ of Certiorari, page A-11.

JURISDICTION

The judgment of the Court of Appeals was entered on August 29, 1973. (A. 135-36). On September 27, 1973, the Court of Appeals denied a timely filed petition for rehearing, Appendix II to the Petition for Certiorari, p. A-10. On December 13, 1973, petitioners timely applied to Mr. Justice Blackmun for an extension of time for filing the petition and an order was entered by Mr. Justice Blackmun on December 17, 1973 extending the time for filing of the petition to February 22, 1974. Appendix IV, *Ibid* p. A-14. The Petition for a Writ of Certiorari was filed February 21, 1974 and Certiorari granted on April 15, 1974. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

1. Whether federal courts have jurisdiction to invalidate, on grounds of insufficiency of evidence, a public school board's decision to suspend a tenth grade student for possession and use of intoxicating beverages at a school function on school premises, where the student presents no claim of deprivation of fundamental constitutional rights of speech, association, religion or equality of race or sex, and where the procedures utilized in effecting the suspension have not been held unlawful?

2. Whether a public school board member is entitled to invoke the doctrine of official or sovereign immunity in a student's civil rights suit under 42 U.S.C. § 1983 so as to avoid individual and personal financial liability except where the acts complained of were done with malice?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

and 42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

The Complaint herein was filed by two tenth grade students (and their parents) of the Mena Special School District of Polk County, Arkansas against certain administrators of the district, the school district itself and all members of the Board of Education in their individual and representative capacities, alleging jurisdiction under 28 U.S.C. §§ 1343(3) and (4), 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. §§ 1981 and 1983 and deprivation of rights under the Fifth, Fourteenth and Ninth Amendments to the United States Constitution. The original Complaint sought injunctive and declaratory relief. (A. 6-12) By amendment (A. 91-92), the plaintiffs claimed monetary damages, both compensatory and punitive. The action complained of was the suspension of the girls for the balance of the school semester because of a school board finding that the students had violated a rule prohibiting possession or use of intoxicating beverages at school or at a school sponsored activity.[1] The rule had been adopted January 10, 1967 after Board consideration of an incident (unrelated to this suit) involving stu-

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[1] The rule is as follows:

"3. Suspension

* * * * * * *

b. Valid causes for suspension from school on first offense: Pupils found to be guilty of any of the following shall be suspended from school on the first offense for the balance of the semester and such suspension will be noted on the permanent record of the student along with reason for suspension.

(1) Immoral conduct

(2) Insubordination

(3) Conduct that would tend to impair the discipline of the school

(4) The use of intoxicating beverages or possession of same at school or at a school sponsored activity

(5) Conduct that would tend to harm other pupils."

(A. 100, 102—Exhibit A to Answer to Interrogatories, No. 7).

dents' consumption of beer at a school function and a Board finding that "drinking intoxicating beverage at school or at a school-sponsored activity is a most serious offense and if tolerated, would impair the discipline of the entire school." (A. 103 —Exhibit B to Answers to Interrogatories, No. 10). The three girls[2] had admitted, first to Mrs. Powell, their teacher, and then to Mr. P. T. "Duddy" Waller, their principal, that on the day scheduled for an extracurricular school function to be conducted on school premises by the home economics department for parents and students (A. 16), they left the school grounds, traveled into the State of Oklahoma[3] and there purchased at a tavern several bottles of a malt liquor beverage (A. 48) with which they intended to "spike" the punch to be served at the function. (A. 17-19, 30-31, 41, 43). They then mixed the malt liquor with several bottles of soft drink, brought it to the school and then added water to the mixture which was ultimately served at the meeting of parents and students just after cessation of classes on that day. (A. 19, 22) Several days after the event, Mrs. Powell learned of the girls' action and upon confronting them with her information, the girls confessed their involvement (A. 23, 43). Mrs. Powell, after first indicating to the girls that she would attempt to handle the discipline herself (A. 23, 43), later decided that the matter should be brought to the attention of Mr. Waller, the principal (A. 24, 44). After the girls had reiterated their confession to him on February 18, 1972, Mr. Waller advised the girls that the Board of Education would have the ultimate responsibility for discipline, but that he was going to suspend them from class and extracurricula activity for one week until such time as the Board could consider the matter, and that he would ask the Board to be lenient (A. 24-26, 45, 51, 56). As it turned out, the Board met in special session that evening to consider the matter (A. 54, 62). Mrs. Powell and Mr. Waller relayed to the Board the statements made by the

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[2] One of the girls, Jo Wall, has not participated in this litigation.

[3] The sale of alcoholic beverages is unlawful in Polk County, Arkansas. (A.33).

girls as to the purchase and use of malt liquor (A. 73) and recommended that the Board be lenient if it felt such an approach warranted (A. 51, 54, 63-64, 70). Before the Board acted on the matter, Mr. Inlow, the Superintendent of Schools who was also at the meeting, received a telephone call from a teacher and was advised that Jo Wall, one of the girls in the incident under consideration by the Board, had been involved in an altercation at a basketball game earlier that evening (A. 51, 64, 73-74). Mr. Inlow announced the substance of the telephone call,[4] (without identifying the name of the girl involved in the altercation) and at that point, Mr. Waller and Mrs. Powell withdrew their recommendation of leniency (A. 51, 70). After discussion, the action decided upon by the Board was to suspend the girls for the balance of the semester (A. 65, 71; see generally Ex C-1, Answers to Interrogatories, Minutes of February 18, 1972 Meeting, A. 105-06).

The next day, February 19, 1972, the school administrators met with the students and their parents to advise them of the action taken. (A. 27-28, 46). Also, on February 24, 1974, the Superintendent wrote to the parents advising of their right to petition the Board for reinstatement (A. 137-38, received in evidence at trial as Defendant Inlow's Exhibit 8). A special meeting of the Board was thereafter held on March 2, 1974 in connection with the request of the students, their parents and attorney (A. 35; see A. 138, received in evidence at trial as Defendant Inlow's Exhibit 9). The Board presented a statement containing its findings[5] supporting the decision (A. 35).

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[4] An alleged threat by Jo Wall to "get even" with someone the former believed to have reported the girls' involvement to Mrs. Powell (A.114).

[5] "FACTS FOUND BY SCHOOL BOARD

1. That Virginia Crain, Peggy Strickland and Jo Wall are students of Mena High School and subject to the governing rules and policies of Mena High School.

2. That on or about February 7, 1972 these three girls were charged with the responsibility of providing refreshments for a school

After the students and their attorney had been heard (A. 35, 46), the Board again voted on the matter and upheld the suspension. (A. 9; see generally Ex. C-2, Answer to Interrogatories, Minutes of March 2, 1972 meeting, A. 106-07). The Board did make provisions so that, by a special course of instruction consisting of correspondence courses and increased course loads, the girls could graduate with their class (A. 36, 47; see 348 F. Supp. at 246).

The Complaint was filed on March 6, 1972 (A. 6) and, on March 7, 1972, the District Court held an evidentiary hearing on the request for a preliminary injunction, made findings of fact and conclusions of law and denied relief (A. 78-84). On March 14, 1972, the Board issued a statement setting forth its view of the situation (A. 139, received in evidence at trial as Plaintiffs' Exhibit 19).

On April 7, 1972, a hearing was held on the plaintiffs' motion to amend their Complaint to seek from the district and from the defendants individually, $50,000 compensatory damages and $5,000 punitive damages from each defendant (A. 86, 91-92). At the hearing, the District Judge suggested that the Board reconsider its action and asked for a report advising of the results of such reconsideration (A. 86-89). The Board did reconsider the action at a regular meeting on April 11, 1972,

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function, being a gathering of students of the Home Economics class and some of their parents, on school premises, being the auditorium building of Mena High School, and being under the direction of Mrs. Curtis Powell.

3. That the three girls in question traveled to Oklahoma, purchased a number of bottles of malt liquor, a beer type beverage, and later went onto school premises with the alcoholic beverage and put two or more of the bottles of the drink into the punch or liquid refreshment which was to be served to members of the class and parents."

(Reproduced at A.137 and received in evidence as Defendants' Exhibit 1 at March 7, 1972 hearing, A.39. The document was Plaintiffs' Exhibit 14 at trial.)

attended by the plaintiffs, and a motion was made to reinstate the children in school but failed to carry (A. 90-91; see generally Exhibit C-4, Answers to Interrogatories, Minutes of April 11, 1972 meeting, A. 108). The jury which heard the case on August 17-19 failed to reach a verdict and a mistrial was declared (A. 122).[6] Thereafter, the District Court granted motions[7] of all defendants for judgment in accordance with their previous motions during trial for directed verdicts. *Strickland v. Inlow*, 348 F. Supp. 244 (W.D. Ark. 1972). The Court held that the Board's rule was reasonable, and had not been unconstitutionally applied, that Arkansas law permitted suspension for any conduct tending to impair discipline and that, in any event, the defendants were immune from liability for damages unless they acted with malice, and the latter had not been shown.

On Appeal to the Court of Appeals for the Eighth Circuit, the judgment was reversed and remanded for a new trial on the issue of damages against the individual school board members.[8] The Court of Appeals held that, in its view, there was no evidence before the school board that the beverage used was "intoxicating"[9] within the terms of the rule and that the

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[6] On appeal to the Court of Appeals, the students included in their Appendix to that Court a very limited portion of the testimony of witnesses at the various hearings and none of the testimony presented during the trial to the jury. The latter testimony has subsequently been transcribed and on June 13, 1974 filed of record with the Clerk of the District Court who at that time had possession of the record in the case. See List of Relevant Docket Entries, A.5.

[7] See Fed. R. Civ. P. 50 (6).

[8] The directed verdict for the school district was affirmed on the authority of *Monroe v. Pape*, 365 U.S. 167 (1961) and for Superintendent Inlow and Principal Waller because they had not voted for or recommended suspension.

[9] The girls have consistently conceded that the beverage purchased was "malt liquor" and "alcoholic." (See e.g. 30-32, 52, 59; *Strickland v. Inlow*, 348 F. Supp. 244, 246). In fact, one of the girls first advised Mr. Waller that the liquid purchased was twenty

students had therefore been deprived of substantive due process. The Court also held that the students were entitled to recover damages from school board members in their individual capacities without a showing of malice and upon a showing that the petitioners did not, in light of all the circumstances, act in good faith, objectively determined. The case was remanded for a trial on the issue of damages. *Strickland v. Inlow*, 485 F.2d 186 (8th Cir. 1973).

Rehearing was denied, with three judges of the Court of Appeals dissenting in an opinion which contended that the respondents had failed to show deprivation of a federally protected right and that ". . . the substantive reach of the due process clause on the public school campus is limited to the protection of specifically identifiable federal constitutional rights." *Ibid.* at 191.

SUMMARY OF ARGUMENT

It is the contention of the petitioners herein that the decision of the United States Court of Appeals for the Eighth Circuit in this case is erroneous in three respects:

(1) That decision totally ignores the issue whether these students have established one of the essential elements of a cause of action under 42 U.S.C. § 1983, i.e. the deprivation of a federally protected right;

(2) It erroneously invokes the discredited doctrine of substantive due process to invalidate a school board's decision to

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percent alcohol (A.52). The District Court characterized the alcoholic—intoxicating beverage distinction as an argument from plaintiffs' counsel, not them or their parents. 343 F. Supp. at 247 and 250. The argument made by the plaintiffs themselves was that the punishment was too severe. *Ibid.* at 250. Other testimony, presumably knowledgeable, was that the alcoholic content of the beverage purchased was "not to exceed 3.2 alcohol by weight." Spahl Deposition, A.93-94.

suspend a student for the balance of a school semester with the sole basis of its holding being a deficiency of evidence to support the decision; and

(3) It renders members of the boards of education of public school districts individually and personally liable for financial damages to a student whom they suspended, even though they acted without malice.

Although many ambiguities surround the proper interpretation of 42 U.S.C. § 1983, it is quite clear that, in order to sustain a cause of action thereunder, the plaintiff must establish the deprivation of a right secured by the Constitution or laws of the United States and that the deprivation was effected under color of state law. *Adickes v. Kress & Co.*, 398 U.S. 144, 150 (1970). This case involves no showing of a deprivation of any specifically identifiable and fundamental right protected by the Due Process Clause of the Fourteenth Amendment or any other provision of the Federal Constitution. This suit is thus unlike *Healy v. James*, 408 U.S. 169 (1972); *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969); *Pickering v. Board of Education*, 391 U.S. 563 (1968) and other cases in which this Court has acted to protect against the action of public school officials whose conduct encroached upon fundamental rights such as freedom of speech, association and racial equality. The claims of these students must of necessity rest on a contention that the federally protected fundamental right deprived them by these school authorities was the "right . . . to receive an education in the public schools provided by the State." (Complaint, Paragraph 13, A. 10).

However, this Court has held that, notwithstanding its undisputed importance, the right to an education is neither explicitly or implicitly protected by the Federal Constitution. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). Although *Rodriguez* occurred in the context of this Court's inquiry into

the proper standard by which to judge the constitutionality of state legislation alleged to violate the Equal Protection Clause of the Constitution, its language and reasoning conclusively demonstrates that neither is the right to education federally protected as a "liberty" or "property" interest within the language of the Due Process Clause of the Constitution. Inquiry concerning the coverage of an interest by the Equal Protection Clause is interrelated with, and relevant to, inquiry into the same interest's coverage under the Due Process Clause. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). In both instances the pertinent inquiry is into the *nature*, not the importance, of the interest. Compare *Rodriguez supra* (equal protection) with *Morrisey v. Brewer*, 408 U.S. 471 (1972) (due process).

Notwithstanding the absence in this case of any interest protected within the liberty or property language of the Due Process Clause of Fourteenth Amendment, the Court of Appeals invoked the much-discredited concept of substantive due process to invalidate the school board's suspension decision. The Court's substantive due process holding rests on its conclusion that the school board's finding of a violation of its rule prohibiting the possession or use of intoxicating beverages at school or at a school sponsored function was erroneous. The Court reasoned that since the beverage involved had not been proven to be "intoxicating" within the terms of the rule, even though the girls have repeatedly admitted that it was in fact "alcoholic" in content, that no violation of the rule had been shown. 495 F.2d at 190. Petitioners contend, as did three Judges of the Court of Appeals who voted to grant the petition for rehearing en banc, that federal courts are without jurisdiction to entertain challenges to the sufficiency of evidence on which their suspension decisions rest, unless of course the decision to suspend involves rights such as were asserted in *Healy, supra*; *Tinker, supra*; and *Pickering, supra*. No federally protected interest is involved, *Rodriguez, supra*, and a student does not assert a proper cause of action under § 1983 merely

by contending that school authorities have acted against him in an arbitrary or unfair manner. *Murray v. West Baton Rouge Parish School Board*, 472 F.2d 438, 444 (5th Cir. 1973). A Complaint alleging arbitrary, capricious and unreasonable action by school authorities does not, without proof that the action affected a federally protected interest, establish a cause of action under § 1983. *Jeffries v. Turkey Run Consolidated School District*, 492 F.2d 1 (7th Cir. 1974); *Scheelhaase v. Woodbury Central Community School District*, 488 F.2d 237 (8th Cir. 1973); *Freeman v. Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969). Cf. *Board of Regents v. Roth*, 408 U.S. 564 (1972). The opinion of the Court of Appeals below is an unwarranted and unwise encroachment on the functioning of public school districts and the federal judiciary itself.

Petitioners contend that a public school board member, acting as such in discretionary functions assigned him by state law, is immune from liability for money damages to a student who alleges a proper claim under 42 U.S.C. § 1983. Where such awards are rendered against officials under circumstances such as those involved in the public school context and where it is in reality a charge against the funds of the State, the Eleventh Amendment constitutes an absolute bar. *Edelman v. Jordan*, — U.S. —, 39 L.Ed.2d 662 (1974). Also, the common law "executive" or "official" immunity defense should, because of the peculiar considerations present in the context of suits against public school board members, constitute an absolute bar to an award of financial damages where the school board members act only as a board performing discretionary duties. *Smith v. Losee*, 485 F.2d 334, 346 (10th Cir. 1973) (opinion of Judge Barrett, partially concurring and partially dissenting); *Abel v. Gousha*, 313 F. Supp. 1030 (E.D. Wis. 1970). In determining the scope of the immunity afforded by the defense, consideration must be given to the nature of the official's duties and responsibility and the considerations which have traditionally justified the immunity doctrine. *Scheuer v. Rhodes*, — U.S.

—. 40 L.Ed.2d 90 (1974). One of the most significant considerations warranting immunity involves the desire to avoid the constant subjection of officials to the burdens of trials in which they are required to defend actions taken by them in the discharge of their duties. *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949).

Even if this Court should conclude that public school board members are not entitled to absolute immunity from liability for discretionary acts within the scope of their duty and authority, plaintiffs in § 1983 actions should be required to establish that the defendant school authorities acted with malice before they are subject to an award of financial damages. The District Court so held. *Strickland v. Inlow*, 348 F. Supp. 244, 250 (W.D. Ark. 1972). See *Smith v. Losee*, *supra* (opinion of Judge Barrett); *Holiman v. Martin*, 330 F. Supp. 1 (W.D. Va. 1971). See also *Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973), and *John v. Hurt*, 489 F.2d 786 (7th Cir. 1973). The conditioning of the immunity defense upon "good faith" action, whether the test of good faith be subjective (*Gaffney v. Silk*, *supra*) or objective as held by the Court of Appeals in this case (see also *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968)), affords inadequate protection to dedicated citizens who spend their time and energies, without financial remuneration, in such positions of responsibility.

ARGUMENT

I. Absent Claims of Deprivation of Fundamental Constitutional Rights of Speech, Association, Religion or Equality of Race or Sex, a Public School Student's Challenge to a School Board's Decision to Suspend Him From School Does Not Present a Federally Cognizable Claim Under 42 U.S.C. § 1983.

A. A Federal Court is without jurisdiction of a student's suit under 42 U.S.C. § 1983, challenging a public school board's suspension decision, unless the student establishes that the decision deprives him of an interest secured by the constitution or laws of the United States.

The students in this case challenge the action of the Board of Education of the Mena Special School District of Polk County, Arkansas, in suspending them from school for the balance of the semester because of a school board finding (A. 137) that the students had violated a rule (A. 102) prohibiting possession or use of intoxicating beverages at school or at a school sponsored activity. The two girls admitted to school officials that they had poured a quantity of alcoholic beverage into punch served at an extra curricular school function conducted on school premises by the home economics department for parents and students (E.g., A. 17-19). Their challenge to the Board's action, presented in a suit filed under 42 U.S.C. § 1983 in the United States District Court for the Western District of Arkansas, was denied in the District Court, *Strickland v. Inlow*, 348 F. Supp. 244 (W.D. Ark. 1972), but sustained in the United States Court of Appeals for the Eighth Circuit. *Strickland v. Inlow*, 485 F.2d 186 (8th Cir. 1973). The Court of Appeals held that the evidence relied on by the Board did not establish a violation of the rule since the alcoholic beverage used had not, in the Court's view, been estab-

lished to have been an "intoxicating" beverage within the terms of the rule. 485 F.2d at 190.

Although the Court of Appeals did not expressly consider the requisite elements of the students' claims under § 1983, those requirements are clear. The plaintiff in such a suit must prove that (1) the defendants have deprived him of a right secured by the Constitution or laws of the United States and (2) that the deprivation was effected under color of state law. *Adickes v. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Monroe v. Pape*, 365 U.S. 167, 184, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). The terms of § 1983 protect only rights, privileges and immunities secured by federal law. Rights, privileges and immunities not derived from the federal Constitution or secured thereby are left exclusively to the protection of the states. Federal courts are without jurisdiction in such instances. 1 *Barron & Holtzoff, Federal Practice and Procedure* § 37. The petitioners here contend that these students have failed to establish the deprivation of a federal right and that the federal courts are without jurisdiction of their claims.

1. A student's interest in continued participation in the educational program conducted by a public school district is not an interest protected by the Constitution of the United States.

The inquiry as to whether a particular interest is embraced within and protected by the Due Process Clause of the Fourteenth Amendment must begin with a consideration of the *nature* of the asserted interest. It is clear that not every "interest" is protected by the Constitution and it is equally clear that the weight or importance of the interest is not determinative whether the interest qualifies as a "liberty" or interest in "property", as those terms are set forth in the Fourteenth Amendment. *Board*

of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Morrisey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 484 (1972). In *Morrisey*, Chief Justice Burger stated:

> "The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the liberty or property language of the Fourteenth Amendment." 408 U.S. at 471.

Earlier cases also furnish guidance. In *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), the Court suggested that the test was whether the interest for which protection was sought was a privilege ". . . long recognized at common law as *essential* to the orderly pursuit of happiness by free men." 262 U.S. at 399 (Emphasis supplied). Mr. Justice Cardozo, in *Palko v. State of Connecticut*, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 (1937), held that the question was whether failure to grant due process would violate a *fundamental* principle ". . . which lies at the base of all our civil and political institutions." 302 U.S. at 328. The emphasis on "fundamentality" has continued to receive the endorsement of this Court. See *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1972); *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); and *Poe v. Ullman*, 367 U.S. 497, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1960).

Prior to *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), this Court had never considered the question whether public education itself constitutes a fundamental right afforded protection under the Federal Constitution. Of course, there have been many instances where this Court was called upon to invoke the provisions of the Federal Constitution in the public school context—however, those cases involved rights other than to public education itself. Thus, on many occasions, the Court has acted to protect interests of individuals affected by action taken by public school officials where those interests involved fundamental rights such as speech,

association and racial equality. See, e.g., *Healy v. James*, 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Tinker v. Des Moines Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

There are no such independent, specifically identifiable federal constitutional rights involved in this case. *Strickland v. Inlow*, 485 F.2d at 192 (dissenting opinion). Rather, the question here is identical to that described by Mr. Justice Powell in *Rodriguez* as follows:

> "It is this question—whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution—which has so consumed the attention of courts and commentators in recent years." 411 U.S. at 29.

That issue arose in *Rodriguez* in connection with the Court's determination of the proper standard by which to review the constitutionality of state legislation which allegedly involved violations of the Fourteenth Amendment's Equal Protection Clause. In order to determine whether to apply the "compelling interest" test or the "rational basis" test, the Court was required to determine the proper characterization of the nature of the interest in public education.

After lengthy analysis which conceded the vital importance of education and reiterated the Court's dedication to the concept of public education, the Court concluded that, notwithstanding its undisputed importance, education itself is not an interest protected by the Federal Constitution. Mr. Justice Powell stated:

> "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal

protection of the laws. Thus the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. (Citations omitted.) 411 U.S. at 33.

"Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a state's social and economic legislation. *Ibid* at 35.

* * * * * * *

We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive. . . ." *Ibid* at 37.

Although *Rodriguez* was the first occasion on which this Court had faced the precise issue concerning the nature of public education in the constitutional scheme, the conclusion in *Rodriguez*, that education is not a federally protected interest, is supported by other authority.[10] In *Flemming v. Adams*, 377 F2d 975

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[10] " 'Education, by contrast, presents a more difficult task for justification of active review. Certainly, judicial competence to deal with the complex problems that plague educational institutions is open to serious question. Moreover, the difficulties of giving effect to decisions in this area are enormous. Unlike voting and fair criminal procedure, education is not an interest which has long been recognized to be of pre-eminent importance. Nevertheless, the pivotal position of education to success in American society and its essential role in opening up to the individual the central experience of our culture lend it an importance that is undeniable. Even so, educa-

(10th Cir. 1967), the Court of Appeals for the Tenth Circuit rejected the argument of a minor student and her mother that the child's right to education was federally protected. The Court stated:

> "The appellant argues that a right to an education is one of the rights secured to her by the United States Constitution, and that the Board deprived her of that right by refusing to approve her application for special education services. Although the importance of education to our democratic society is obvious to all, *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), we do not agree that the right to an education is among those rights guaranteed by the federal Constitution."
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> "The United States Constitution does not secure to the appellant the right to an education; rather the Constitution secures the appellant's right to equal treatment where the state has undertaken to provide public education to the persons within its borders." 377 F.2d at 977.

Thus, the plaintiffs' suit under § 1983 was dismissed. See also *Byrd v. Sexton*, 277 F. 2d 418 (8th Cir. 1960) where, while a Judge on the Court of Appeals for the Eighth Circuit, Mr. Justice Blackmun wrote the opinion dismissing a pupil's § 1983 suit alleging a civil right violation arising out of the imposition of an enrollment fee. The Court there held that the right asserted "is not one secured by the Fourteenth Amendment and affords no basis for a suit brought under the sections of the Civil Rights Acts relied upon . . . ." 277 F.2d at 424. It was held that whatever cause of action the plaintiff might have, it was one involving the invasion of personal rights for

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tion does not seem quite so fundamental as rights of criminal defense and voting. Developments in the Law Equal Protection, 82 Harv.L. Rev. 1065, 1129 (1969).'" *Grier v. Bowker*, 314 F. Supp. 624, Note 1 at 626 (S.D. N.Y. 1970).

which state laws and state forums provided the avenues of relief. Finally rejecting the plaintiffs' reliance on *Brown v. Board of Education, supra,* Mr. Justice Blackmun stated:

> "It is perhaps initially to be observed that the language quoted from *Brown* implies certain limitations. Neither that language nor the holding itself prescribes as a *federal* right the availability of education, let alone free education, through state facilities. The opinion stands for the proposition that only 'where the state has undertaken to provide it', the opportunity of an education 'is a right which must be made available to all on equal terms'." 277 F.2d at 425.

Mr. Justice Black accurately prophesied the *Rodriguez* holding in his remarks stated in *Karr v. Schmidt,* 401 U.S. 1201, 91 S.Ct. 592, 27 L. Ed. 2d 797 (1971):

> "I refuse to hold for myself that the federal courts have constitutional power to interfere in this way with the public school system operated by the states. And I furthermore refuse to predict that our court will hold they have such power. It is true that we have held that this court does have power under the Fourteenth Amendment to bar state public schools from discriminating against Negro students on account of their race, but we did so by virtue of a direct, positive command in the Fourteenth Amendment, which like the other Civil War Amendments, was primarily designed to outlaw racial discrimination by the states. There is no such direct, positive command about local school rules with reference to the length of hair state school students must have. And I cannot now predict this court will hold that the more or less vague terms of either the Due Process or Equal Protection Clause have robbed the states of their traditionally recognized power to run their school systems in accordance with their own best judgment as to appropriate length of hair for students." 401 U.S. at 1202.

See also *Steier v. New York Education Commissioner*, 271 F.2d 13 (2d Cir. 1959) cert. denied 361 U.S. 966; *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961) (dissenting opinion) cert. denied 368 U. S. 930. And cases subsequent to *Rodriguez* have held education to be beyond the scope of federally protected rights. *Sturgis v. State of Washington*, 368 F. Supp. 38 (W.D. Wash. 1973) affirmed 94 S.Ct. 563; *Stock v. Texas Catholic Interscholastic League*, 364 F. Supp. 362 (N.D. Tex. 1973); *Houston v. Prosser*, 361 F. Supp. 295 (N.D. Ga. 1973).

In the case under consideration on this Petition, the Court of Appeals for the Eighth Circuit did not even mention in its opinion the issue whether these students' claim properly asserted an interest protected by the Constitution or § 1983. The issue *was* emphatically raised by Chief Judge Mehaffy who, joined by two other Circuit Judges, dissented from the denial of the Petition for Rehearing en banc. He stated:

> "I cannot agree . . . with the panel's conclusion that the due process clause of the Fourteenth Amendment empowers this or any other federal court to review every public school disciplinary action on the basis of sufficiency of the evidence. Instead, I am firmly convinced that the substantive reach of the due process clause on the public school campus is limited to the protection of specifically identifiable federal constitutional rights." *Strickland v. Inlow*, 485 F.2d 186, 191-92 (8th Cir. 1973) (dissenting opinion).

Moreover, in virtually every case where this Court has acted to protect truly fundamental constitutional rights asserted in the school context, cautionary language was employed concerning the propriety of federal court intervention in matter of public school administration. Thus, although "the vigilant protection of constitutional freedoms is nowhere more vital than in the com-

munity of American schools," *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S.Ct. 247, 5 L.Ed. 2d 231 (1960), nevertheless this Court has ". . . repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with *fundamental constitutional safeguards*, to prescribe and control conduct in the schools." *Tinker v. Des Moines Community School District, supra* at 507 (Emphasis supplied). And in *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed 2d 228 (1968), this Court stated:

> "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and belief. By and large, public education in our Nation is committed to the control of state and local authorities. *Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.*" (Emphasis supplied.) 393 U.S. at 104.

Caveats such as that expressed in *Epperson, supra*, culminated in the Court's direct recognition, in *Rodriguez*, of the peculiarly local nature of the education function:

> "In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of intractable economic, social, and even philosophical problems. *Dandridge v. Williams*, 397 U.S. at 487." 411 U.S. at 42.

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"It must be remembered also that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. . . . '[T]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action.' (Citations omitted.)" 411 U.S. at 44.

Pointing out that both the majority and the dissenting opinions in *Wright v. Council of the City of Emporia*, 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed 2d 51 (1972) recognized the importance of local control of public education, the Court in *Rodriguez* called particular attention to Chief Justice Burger's remark that "[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." 407 U.S. at 478.

The educational issues here are perhaps not nearly so complex as those involved in *Rodriguez*. However, the Court there, in mentioning the various ways in which the State of Texas had exerted its legitimate interest in local control of its educational programs, made specific reference to the State's assumption of the power and responsibility "to maintain order and discipline . . . including the prerogative to suspend students for disciplinary reasons. . . ." 411 U.S. at 51-52. Note 108.[11] Although main-

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[11] Arkansas Act No. 169 of 1931, § 170 [Ark. Stat. Ann. § 80-1516 (Repl. 1960)] provides:

"Suspension of pupils—Causes—Right to appeal.—The directors of any school district may suspend any person from school for immorality, refractory conduct, insubordination, infectious disease, habitual uncleanliness or other conduct that would tend

tenance of discipline may not appear a complex issue, it is nonetheless vital to public education. In *Laucher v. Simpson*, 28 Ohio App. 2d 195, 276 N.E. 2d 261 (Ct. App. Knox Co. 1971), it was observed:

> "Discipline is indeed a part of the educational process and we so hold.
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> "Our system of public education, established to equip citizens with the skills they need to stay free under a rule of law must, if it is to succeed, thoroughly inform its students that the liberty and rights of all depend upon the willingness of the individual to discipline himself to respect the rights of others and that he learn to subordinate his individual desires when they conflict with the legitimate interests of others. Disciplined respect for the rights of others is essential to the survival of liberty." 28 Ohio App. 2d 198.

This sentiment was echoed by Mr. Justice Black in his dissent in *Tinker v. Des Moines Community School District*, 393 U.S. 503, 524, 89 S.Ct. 733, 741, 21 L. Ed. 2d 731, 743 (1969):

> "School discipline, like parental discipline, is an integral and important part of training our children to be good

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to impair the discipline of the school or harm the other pupils, but such suspension shall not extend beyond the current term. The board of directors may authorize the teacher to suspend any pupils, subject to appeal to the board."

The general powers and duties vested in Arkansas school boards were set forth in Act No. 169 of 1931 and the statute has been amended several times. In its current form, see Ark. Stat. Ann. § 80-509, it deals with, inter alia, the care and custody of grounds, buildings and property (Section a); the provision of school facilities (Section b); the employment of personnel (Section d); curriculum content (Section e); seeing to "the welfare of the pupils and encouraging them in their studies" (Section g); the handling of finances (Sections h, i, j); the provision of school supplies (Section k); the preparation of budgets (Section l); and the doing of "all things necessary and lawful for the conduct of an efficient free public school or schools in the district" (Section m). Other duties and responsibilities are covered by specific statutes.

> citizens—to be better citizens. Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not have to be a prophet or the son of a prophet to know that after the court's holding today, some students in Iowa schools, and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders." 393 U.S. at 525.

There are cases from lower federal courts which either explicitly or by implication, suggest that a student's right to education *is* federally protected. However, except where the holding is explicit, see e.g. *Lopez v. Williams*, 372 F. Supp. 1279 (S.D. Ohio 1973), probable jurisdiction noted 94 S.Ct. 1405, we contend that the suggestion resulted from a failure to recognize and distinguish situations involving deprivations of fundamental constitutional rights such as speech or assembly from those where no such specifically identifiable constitutional interests are involved. Federal Constitutional protection is of course due the former—but not the latter situations.

Cases such as *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971) manifest an incredibly simplistic approach, coming to momentous conclusions without real analysis. The sole reference to the issue in that case was itself the conclusion reached.

> "It would seem beyond argument that the right to receive a public school education is a basic personal right or liberty. Consequently, the burden of justifying any school rule or regulation limiting or terminating that right is on the school authorities. Cf. *Richards v. Thurston*, 424 F.2d 1281, at 1286 (1st Cir. 1970) . . . ." 323 F. Supp. at 1158.

Richards v. Thurston, supra, however found not that "the right to receive a public education is a basic (constitutional) right or

liberty," but that the right of a student to control his personal appearance (hair length) was a protected personal liberty. We do not stop to consider the correctness of that conclusion,[12] but simply note that it does not support conclusion reached in *Ordway*.

More troublesome than cases such as *Ordway, supra,* is the recent decision in *Lopez v. Williams, supra,* now pending as *Goss v. Lopez* in this Court on an appeal from the decision of a three-judge panel. (O.T. 1973, No. 73-898) *Lopez* was a class action brought by certain students of the Columbus, Ohio public schools challenging the constitutionality of their suspensions from school. 372 F. Supp. at 1292. In its approach to deciding whether school authorities were obliged under the Constitution to afford procedural due process in suspension procedures, the Court first stated:

> "The Supreme Court has not resolved the question of whether a student's statutory right to an education is a liberty which is protected by due process of law. . . ." 372 F. Supp. at 1297.

Then, in a strained analysis, the District Court attempted to distinguish the Court's holding in *Rodriguez*:

> "Recently in *San Antonio School District v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L. Ed. 2d 16 (1973), the Supreme Court was presented with the question of whether differential State aid to local school districts violates the equal protection clause of the Fourteenth Amendment. The Court, in determining whether the rational basis test . . . or the compelling state interest test . . . should be applied to the legislative scheme, stated that the right to an edu-

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[12] Compare *Karr v. Schmidt,* 460 F.2d 609 (5th Cir. 1972) (en banc) and *Freeman v. Flake,* 448 F.2d 258 (10th Cir. 1971), cert. denied 405 U.S. 1032 with *Bishop v. Colaw,* 450 F.2d 1069 (8th Cir. 1971).

cation was not explicitly or implicitly guaranteed by the Constitution. Consequently, the Court applied the rational basis test, not the compelling state interest test. *San Antonio School District v. Rodriguez*, 411 U.S. at 29, 93 S.Ct. 1278, *supra*.

"The Supreme Court's holding that the right to an education is not explicitly or implicitly guaranteed by the Constitution does not affect the determination of whether it is a liberty or property which can not be interfered with by the State without the protection of due procedural safeguards. As noted above, interests included within the concepts of liberty and property are often rights created by the State which have no constitutional status (footnote omitted).

"The question presented is whether the State created right to an education is a protected liberty under the Fourteenth Amendment's due process clause (footnote omitted)." *Ibid* at 1298-99.

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"Considering the importance of education in our society today, the Court holds that the state created entitlement to an education is a liberty protected by the due process clause of the Fourteenth Amendment." *Ibid* at 1300.

We earnestly submit that Lopez (and the similar implicit holding in this case) is erroneous and an inexplicable evasion of this Court's clear holding in *Rodriguez*. First, *Lopez* may be technically correct in stating that this Court has not specifically held that the right to an education is, or is not, protected by the *Due Process Clause*. However, the Court's language in *Rodriguez* clearly states that education is not protected by *the Federal Constitution*, which would seem to encompass the entire document, including not only the Equal Protection Clause there involved but also the Due Process Clause. We again call attention to the exact language of *Rodriguez*:

"It is this question—whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution—which has so consumed the attention of courts and commentators in recent years. (footnote omitted)" 411 U.S. at 29.

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"Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected." 411 U.S. at 35.

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"We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive." 411 U.S. at 37.

Secondly, it should be pointed out that, contrary to the suggestion implicit in *Lopez*, a decision that a particular interest is not fundamental and thus not within the protection of the Equal Protection Clause should at least be highly probative of whether that interest is encompassed within the Due Process Clause and vice versa. See *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954) holding that segregated education was just as unlawful under the due process clause as it had been held to be under the equal protection clause in *Brown v. Board of Education, supra*. Although the two concepts are not always "interchangeable," they are not mutually exclusive, with "both stemming from our American ideal of fairness . . .," and with equal protection being a "more explicit" safeguard. *Bolling v. Sharpe*, 347 U.S. at 499. See also *Roe v. Wade*, 410 U.S. 113, 35 L. Ed. 2d 147, 93 S.Ct. 705 (1973) where this Court found a violation of the due process clause of the Fourteenth Amendment present in the Texas State Criminal Abortion Statutes. In determining the constitutional validity (under the Due Process Clause) of various portions of the

statutory scheme, the Court gave consideration to the "compelling state interest" test which originated in connection with alleged violations of the Equal Protection Clause.[13] And in determining the nature of interests protected by the Due Process Clause, this Court in *Morrisey*, *supra*, employed the same approach to analysis as did *Rodriguez*. Both cases indicated that constitutional protection is not afforded simply because the interests are important. *Morrisey*, 408 U.S. at 471; *Rodriguez*, 411 U.S. at 33-34. Also, apparently referring to the Due Process Clause, Mr. Justice Stewart noted in his concurring opinion in *Rodriguez*:

> "Moreover, *quite apart from the Equal Protection Clause*, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose or effect is to create any classifications." (Emphasis supplied) 411 U.S. at 61.
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> ". . . [t]he Texas system impinges upon no substantive constitutional rights or liberties." *Ibid* at 62.

Lopez is clearly contrary to the rationale of *Rodriguez* in its treatment of whether the right to a public school education is fundamental and therefore protected by the liberty or property language of the Fourteenth Amendment. It is interesting to note that, in declining to draw a distinction between a student suspension and a student expulsion and to thereby afford constitutional coverage to one but not the other, the Court stated "The right to an education . . . *either is, or is not* a liberty under

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[13] In fact, Mr. Justice Rehnquist, in dissent, characterized the Court's approach in *Roe* as ". . . transposing it (the compelling state interest test) from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment." 410 U.S. at 173.

the Fourteenth Amendment." 372 F.Supp. at 1300 (Emphasis is supplied). The Court then disregarded its own observation and held that, while the right to education may not be a liberty under the equal protection clause (per *Rodriguez*) it would nevertheless be treated as a liberty under the due process clause.[14] That anomalous result cannot be permitted to stand in light of the clear and comprehensive inquiry in *Rodriguez* as to the proper characterization of the interest in education and its ultimate holding that the interest is one committed to the protection of the states. Nor can the *sub silentio* holding of the Court of Appeals in this case—that the plaintiffs have established deprivation of an interest protected by the Constitution—be sustained.

2. **The concept of substantive due process is inapplicable to a school board's decision to suspend a student for the balance of a school term.**

As has been previously pointed out, the Court of Appeals for the Eighth Circuit in this case never expressly considered whether the plaintiffs had been deprived of a liberty or property interest protected by the due process clause of the Fourteenth Amendment. Rather the Court "skipped over" that question and instead invoked the doctrine of substantive due process to invalidate the Mena School Board's suspension decision without discussing whether a federal right was involved. The Court's substantive due process holding rests on its conclusion that the school board's finding of a violation of its rule prohibiting the possession or use of intoxicating beverages at school or at a school sponsored function was erroneous. The Court reasoned that since the beverage involved had not been established to have been an "intoxicating" one, no violation of the rule had been shown, even though the girls admitted that the beverage was in fact "alcoholic." 495 F.2d at 190.

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[14] *Lopez* does concede that education is not a "property" interest protected by the Constitution. 372 F.Supp. at 1299, Note 16.

In response to that holding by the panel, Chief Judge Mehaffey stated, in dissenting from the denial of the petition for rehearing en banc:

> "My principal disagreement with the panel's opinion involves its use of substantive due process as the basis for reversal. * * * I cannot agree . . . with the panel's conclusion that the due process clause of the Fourteenth Amendment empowers this or any other federal court to review every public school disciplinary action on the basis of sufficiency of the evidence. Instead, I am firmly convinced that the substantive reach of the due process clause on the public school campus is limited to the protection of specifically identifiable federal constitutional rights."
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> * * * * * * *
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> ". . . I thought the federal judiciary had long since rejected such a free-wheeling use of 'substantive due process' because it inevitably had led to an unwarranted invasion of the duties and responsibilities of state and local governments. E.g. *Ferguson v. Skrupa*, 372 U.S. 726 (1963). * * * I fear that the panel's opinion now places every federal court, at least in this Circuit, in the position of serving as a board of appeal for every disciplined public school student who feels that his punishment was too severe or that the school board's decision was not supported by substantial evidence. I feel that this function is one that is the sole responsibility of the state and local governments, which in this case have long provided an appropriate judicial remedy. E.g., *Douglas v. Campbell*, 89 Ark. 254, 116 S.W. 211 (1909)." 485 F.2d at 191-92.

It is the position of the petitioners here that since the right of a public school student to continued participation in a local educational program is not an interest protected within the liberty and property language of the Fourteenth Amendment Due

Process Clause, the concept of substantive due process is inapplicable to such a student's challenge to a disciplinary decision.[15] The only basis upon which a contrary conclusion could be reached, and substantive due process invoked to invalidate a decision comparable to that made by the school board involved herein, would involve a holding that every person has a federally assertable right to be free from *any* governmental action if it might be characterized as arbitrary, capricious or unreasonable. Yet, that conclusion is clearly not sound constitutional doctrine. See e.g. *Snowden v. Hughes*, 321 U.S. 111, 63 S.Ct. 397, 88 L. Ed. 497 (1944) ("A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored."); *Gryger v. Burke*, 334 U.S. 728, 731, 68 S.Ct. 1256, 92 L. Ed. 1683 (1948) ("We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695, 69 S.Ct. 1457, 93 L. Ed. 2d 1628 (1949) ("It is argued that an officer given the power to make decisions is only given the power to make correct decisions. * * * We have heretofore rejected the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was was empowered to do so.").

Many cases have likewise refused to apply the doctrine of substantive due process in the school context where it was asserted that any arbitrary, capricious or unreasonable action taken by school authorities should be held invalid under the Federal Constitution. See e.g. *Jeffries v. Turkey Run Consolidated School District*, 392 F.2d 1 (7th Cir. 1974); *Scheelhaase*

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[15] This argument presumes, as did the former one, that no "specifically identifiable," and thus admittedly protected, constitutional interest is involved.

v. Woodberry Central Community School District, 488 F.2d 237 (8th Cir. 1973); *Freeman v. Gould Special School District*, 405 F.2d 1153 (8th Cir. 1969). In fact, that was the very essence of this Court's reasoning in the non-tenured teacher cases where it was held that such a teacher had no protected federal interest and therefore no right to demand from school authorities a statement of the reasons for the non-renewal of teaching contracts, nor an opportunity to be heard in connection therewith. *Board of Regents v. Roth, supra; Perry v. Sindermann*, 408 U.S. 593, 33 L.Ed. 2d 570, 92 S.Ct. 2694 (1972).

Jeffries, supra, instructively states the issue and we submit, reaches the proper conclusion. There, a school teacher who admittedly had no constitutional right to procedural due process in connection with the non-renewal of her teaching contract, nevertheless filed suit under 42 U.S.C. § 1983 alleging that she was protected by the concept of substantive due process against "arbitrary and capricious" action of the school authorities. 492 F.2d at 2. Describing her Complaint, the Court states:

> "She makes no claim to tenure as a matter of state law, but does allege a violation of her constitutional rights because the defendants' decision was made 'for reasons which are arbitrary and capricious, being wholly without basis in fact or in logic.' " 492 F.2d at 2.

The Court's discussion proceeds:

> "The claim that a person is entitled to 'substantive due process' means, as we understand the concept, that state action which deprives him of life, liberty, or property must have a rational basis—that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as 'arbitrary.' Since standards of 'irrationality' or 'arbitrariness' vary from time to time and from judge to judge, applications of the concept—indeed, the concept itself—have generated serious criticism of the judiciary and the judicial function. (footnotes omitted)

"In this case we need not appraise the viability of the concept, or the extent to which it authorizes federal judges to impose their own views about what is 'unrelated to the education process or to working relationships within the educational institution' upon locally elected school boards. (citing *Drown v. Portsmouth School District*, 451 F.2d 1106, 1108 (1st Cir. 1971)). For the same critical objection to any procedural due process claim by the plaintiff also forecloses her argument based on 'substantive due process.'

"The Fourteenth Amendment prevents the state from depriving any person of liberty or property without due process of law. As *Roth* squarely holds, the right to procedural due process is applicable only to state action which impairs a person's interest in either liberty or property. Certainly the constitutional right to 'substantive' due process is no greater than the right to procedural due process. Accordingly, the absence of any claim by the plaintiff that an interest in liberty or property has been impaired is a fatal defect in her substantive due process argument." 492 F.2d at 3, 4.

Likewise, the Court in *Jeffries* foresaw the same consequences as did Chief Judge Mehaffy in his dissent in this case if the concept of substantive due process were applied. The Court notes:

". . . Plaintiff seems to argue that, entirely apart from her position as a teacher, as a citizen she has a 'substantive right to be free from arbitrary and capricious governmental action.' . . . She does not identify the source of any such right, but necessarily must be contending that it is an interest in 'liberty' protected by the Fourteenth Amendment. . . . In practical terms, if her argument were valid, every time a citizen was affected by governmental action, he would have a federal right to judicial review." 492 F.2d at 4, Note 8.

The Court then concludes that no such result should follow, "in view of contemporary reluctance to embrace the concept of substantive due process." *Ibid.* See *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, — U.S. —, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973); *Truax v. Corrigan*, 257 U.S. 312, 344, 42 S.Ct. 124, 66 L.Ed. 254 (1921) (dissenting opinion of Mr. Justice Holmes.) The matter could not be more succinctly put than in *Murray v. West Baton Rouge Parish School Board*, 472 F.2d 438, 444 (5th Cir. 1973) where it is stated:

> "In order to avoid any misinterpretation and even at the risk of redundancy, we conclude by emphasizing that the Constitution is not fenced out of the school grounds, but that every barb felt by students or parents in the school fence is not constitutionally offensive. Although we shall not hesitate to use our constitutional clippers where appropriate, we cannot forget that a public school principal retains considerable freedom to administer his realm. For better or for worse, *our jurisdiction attaches only when the Constitution has been violated—not every time a principal acts arbitrarily or unfairly*. In affirming the dismissal of this claim we are in no way passing on the propriety or wisdom of the disciplinary and testing practices of West Baton Rouge Parish. We merely held that on the facts of this case, plaintiffs have totally failed to prove a deprivation of any constitutional right." (Emphasis supplied).

The potential consequences of the substantive due process holding by the Court of Appeals in this case may well have been understated by the dissenting opinion of the three Judges who would have granted rehearing. According to the Amicus Curiae Brief filed in *Goss v. Lopez, supra*, by the various interested Ohio Associations, the school districts in Cincinnati, Akron and Cleveland alone suspended a total of 26,004 students in the 1972-73 school year. Amicus Curiae Brief of the Buckeye Association of School Administrators, et al. p.2 (O. T. 1973, No. 73-898). What if only an insubstantial percentage

of the nation's suspended students filed §1983 damage actions alleging an excessively severe punishment or an arbitrary decision? And why, if the right to education is federally protected, confine §1983 claims to *suspended* students—what of students who claim violations of substantive due process (arbitrariness) in the administration of corporal punishment, Cf. *Gonyaw v. Gray*, 361 F. Supp. 366 (D. Vt. 1973), or in the exclusion from interscholastic sports, Cf. *Kelly v. Metropolitan County Board of Education*, 293 F. Supp. 485 (M.D. Tenn. 1968), or even the manner in which a student was given a failing grade, Cf. *Connelly v. University of Vermont*, 244 F. Supp. 156 (D. Vt. 1965)? Petitioners submit that this Court has already "drawn the line" to prevent that encroachment on the functioning of public school districts, and indeed, on the federal judiciary itself. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973).

II. A Public School Board Member Sued in His Individual Capacity by a Student Alleging a Cognizable Claim Under 42 U.S.C. §1983 Is Immune From Liability for Money Damages.

A. Common law official and sovereign immunities remain viable defenses in §1983 suits.

It is clear that 42 U.S.C. §1983 does not prevent defendants in civil rights suits from invoking as defenses the traditional common law doctrines of sovereign and official immunity from liability. See e.g. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). In recent §1983 cases, this Court has affirmed the continued viability of the sovereign immunity defense under the Eleventh Amendment.[16] *Edelman*

[16] "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

v. Jordan, — U.S. —, 39 L.Ed. 2d 662 (1974) and the common law "executive" or "official" immunity defense, *Scheuer v. Rhodes*, — U.S. —, 40 L.Ed. 2d 90 (1974) (discussing both official immunity and the Eleventh Amendment defense). Thus in *Edelman*, the Court held:

> "But it has not heretofore been suggested that §1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself. Though a §1983 action may be instituted by public aid recipients such as respondent, a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief. *Ex parte Young supra*, and may not include a retroactive award which requires the payment of funds from the state treasury, *Ford Motor Co. v. Department of Treasury, supra*."
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> 39 L.Ed. 2d at 680.

The Court there reversed that portion of the District Court decree which ordered the Director of Illinois Department of Public Aid to make retroactive payment of benefits ultimately deemed to have been wrongfully withheld. That result followed even though the State itself was not a party to the litigation and the money damage award was entered against the individual state officer defendant, since the money award would obviously not be paid out of the pocket of petitioner Edelman," 39 L.Ed. 2d at 673 citing *Rothstein v. Wyman*, 467 F.2d 226 (2nd Cir. 1972), cert. denied, 411 U.S. 921 (1973), and was deemed in reality a charge against the State itself, prohibited by the Eleventh Amendment.

The official immunity defense has also been given considerable recent attention by federal courts hearing §1983 cases. The general considerations involved in the doctrine were discussed in

Scheuer v. Rhodes, supra, and the original rationale of the immunity as:

> "(1) The injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; [and] (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." 40 L.Ed. 2d at 99.

As the doctrine evolved, it became clear, as stated in *Scheuer v. Rhodes, supra,* that the principal policy consideration pervading its development was in the need for prompt, conscientious decision-making by persons in positions of official responsibility:

> "Public officials, whether Governors, Mayors or police, legislators or judges who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices. (footnote omitted) Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." 40 L.Ed.2d at 99-100.

One of the most important considerations justifying immunity was expressed by Judge Learned Hand in *Gregoire v. Biddle,* 177 F.2d 579 (2nd Cir. 1949):

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous

> to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that *to submit all officials . . to the burden of a trial and to the inevitable danger of its outcome, would damper the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.* Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith." 177 F.2d 581. (Emphasis supplied).

We next consider the importance of the doctrines in the school context.

> B. **In the context of a suit by a student against a public school board member, the considerations justifying immunity from liability warrant recognition of an absolute immunity from liability for acts within the scope of his duty and authority.**

Petitioners submit that immunity considerations are nowhere more important than in money damage claims against school administrators and board members in their individual capacity. We concede that remarkably diverse results have been reached in the lower federal courts, see e.g. *Blanton v. State University of New York*, 489 F.2d 377 at 382 (2d Cir. 1973), where the Court wryly remarks that the scope of official immunity, "is, to put it mildly, not pellucidly clear." The issue arose in *Smith v. Losee*, 485 F.2d 334 (10th Cir. 1973), on hearing by the Court of Appeals en banc, and the majority opinion of the Court there noted that the scope of the official immunity doctrine varies according to the nature of a particular official's duties and functions. 485 F.2d at 342. See also *Scheuer v. Rhodes, supra; Doe v. McMillan*, 412 U.S. 306, 93 S.Ct. 2018, 36 L.Ed.2d 912

(1973); *Barr v. Mateo*, 360 U.S. 564, 573, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959). Noting that absolute immunity or privilege was afforded to legislators, judges, judicial officers and some executive officers, the Court then observed:

> "The doctrine is applied in a somewhat different form to other officials—a qualified privilege—whereby in an action it may be asserted as a matter of defense, but it is 'qualified' in that proof to support the defense is required. This proof is often lack of malice, or good faith, or some similar showing of good and proper cause for the act complained of. If such a defense can be established during the course of the trial, the jury or judge must then find for the defendant. This qualified privilege thus does not meet that element of the purpose of the rule that the official should not be required to expend time in the defense of litigation brought against him, but it is in accord with the other elements." 485 F.2d at 342.

In comment particularly appropriate to the instant case, it was stated:

> "Considering the purpose and reason for the doctrine as above expressed, it is applicable today with the complexity of government, with the growth of commissions and boards, and with broad and important duties and responsibilities assigned to such panels. *Many of the important governmental functions, especially those relating to various institutions, are placed in boards of local citizens who give their time and talents usually without compensation. This volunteer talent has come to provide a significant part of the important decision-making, policy-making functions in today's government.* These boards are supported by full-time and paid officials charged with the day to day administration of the particular institution or group of institutions." (Emphasis supplied.) 485 F.2d at 341.

Then with express reference to the public school context, the Court notes that this Court has never defined the official immunity doctrine in cases where school boards were defendants, and points out the different results that have been reached by the various Courts of Appeal facing the issue in school and other contexts. Compare *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971) (refusing to recognize the privilege); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968) (conditioning successful invocation of privilege with a proper defense on the merits) and *Nelson v. Knox*, 256 F.2d 312 (6th Cir. 1958) (a "good faith" test). Concluding its analysis, *Smith v Losee*, *supra*, did observe that:

> "[T]he defendant members of the Board of Education are charged with broad duties and given extensive powers under the Utah statutes. These duties and powers, within their limited subject matter are not greatly dissimilar from those of a legislative body. They are required to formulate rules and regulations for the institutions to establish and announce policies on fundamental matters." 485 F.2d at 344.

However, despite a strong dissent, the majority held school board members entitled to only a qualified immunity to be established by an "affirmative showing" that the decision challenged was within the area of discretion bestowed by state law, made in good faith, without malice and supported by a "good and valid reason." 485 F.2d at 344.

Petitioners submit that both the ultimate holding in *Smith v. Losee*, *supra*, and the even greater restriction of the immunity defense by the Court of Appeals in the instant case (the immunity is conditional on good faith action, objectively determined without any requirement of malice), are erroneous, not appreciative of the considerations supporting immunity in the school context and amount to an immunization from liability

only where the school board members make "correct" decisions. See *Weddle, Damages Under § 1983: The School Context*, 46 Ind. L.J. 521 at 530, Note 56 (1970-71). The only manner in which one of the most vital immunity considerations, that recognized by Judge Hand in *Gregoire v. Biddle, supra*, can be protected is by an absolute immunity for school board members acting within the scope of their discretion under state law. Otherwise, any public school student can force a board member to trial on a money damage claim ". . . merely by catchall allegations of unfairness and mistake." *Palmigrano v. Mullen*, 491 F.2d 978 (1st Cir. 1974).

In his separate opinion in *Smith v. Losee, supra*, Judge Barrett argued for absolute privilege under the doctrine of sovereign immunity, utilizing a rationale similar to that of this Court in *Edelman, supra:*

> "In those states in our Circuit where the doctrine of sovereign immunity has not been abrogated insofar as official acts of members of a school board or board of education—trustees or educational administrators is concerned—I believe that the rule laid down in *State Highway Commission of Wyoming v. Utah Construction Company*, 278 U.S. 194, 49 S.Ct. 104, 73 L.Ed. 262 (1929) protects them from any personal liabilities because they serve as the state's alter ego and, of course, the state is not a 'person' subject to a Civil Rights suit under §1983. *Williams v. Eaton*, 443 F.2d 422 (10th Cir. 1971)." 485 F.2d at 346.
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> * * * * * * *
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> "I do not believe that the federal Civil Rights Act overrides the sovereign immunity grants recognized and nurtured in the wisdom of the legislative bodies and courts of the respective sovereign states, as guaranteed them by the federal Constitution (those powers not expressly granted to the United States are reserved to the states) and the pro-

> tective armor of the Eleventh Amendment. In those states within our Circuit where the sovereign immunity doctrine is viable in relation to Boards of Education, school administrators, and other public officials, I would come down on the side of the states regardless of the fact that the action is based on the federal Civil Rights Act." *Ibid.* at 347.

Whatever its theoretical justification, be it the Eleventh Amendment sovereign immunity applied in *Edelman, supra,* or the concept of official immunity discussed in *Scheuer, supra,* the considerations of federal intervention in public school matters committed to local state authorities, and the nature of the public education interest itself, as discussed in *Rodriguez, supra,* dictate that the immunity of school board members who serve without pay should be absolute in cases where they act as a Board performing discretionary duties. See *Guelich v. Mounds View Ind. School District,* 334 F. Supp. 1276 (D.C. Minn. 1972); *Derby v. Univ. of Wisconsin,* 325 F. Supp. 163 (E.D. Wisc. 1971); *Abel v. Gousha,* 313 F. Supp. 1030 (E.D. Wisc. 1970); *Lessard v. Von Dale,* 318 F. Supp. 74 (E.D. Wisc. 1970); Cf. *Hoffman v. Halden,* 268 F.2d 280 (9th Cir. 1959).

The remarks of Mr. Justice Black in a different, but related context, are peculiarly appropriate here:

> "One does not have to be a prophet or the son of a prophet to know that after the Court's holding today, some students in Iowa schools, and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders."
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> *Tinker, supra,* 393 U.S. at 525.

Nor is prophecy required to anticipate the effect of arming public school students with the right to seek money damages from board members of school districts furnishing their education. The deterrent effect on public-spirited citizens who might

otherwise actively seek office on a Board of Education, and dedicate his time and energies to a position of significant responsibility without financial reward of any kind, will be overwhelming.

C. Even if absolute immunity from liability is not warranted, the defense of official immunity of public school board members in § 1983 suits for damages by public school students should be accorded a broad scope so as to deny recovery of financial damages except where the acts complained of are done with malicious intent.

Should this Court deem absolute immunity inappropriate, with the result that the various elements of the immunity defense must be considered at trial, the successful maintenance of a money damage claim should at the minimum be conditioned on a showing that the defendants acted with malice. The District Court so held in this case—"Damages against a school district, a school administrator or a school board member should never be permitted unless they result from a malicious motive and action." *Strickland v. Inlow*, 348 F. Supp. 244, 250 (W.D. Ark. 1972). See *Smith v. Losee, supra* (opinion of Judge Barrett partially concurring and partially dissenting); *Holliman v. Martin*, 330 F. Supp. 1 (W.D. Va. 1971).

In his separate opinion in *Smith v. Losee, supra*, Judge Barrett argued for absolute privilege under the doctrine of sovereign immunity, 485 F.2d at 346-47, or absent that, *at least* a requirement that, in order for a civil rights plaintiff to avoid the immunity defense of school officials, he be required to prove that the latter performed a discretionary function with *malice*. *Ibid* at 347. Judge Barrett describes the consequences of the *Smith v. Losee* holding with recognition of the alarming results:

> "Neither a state nor its alter ego is a citizen or person subject to suit without its consent as required by the Eleventh

Amendment. *State Highway Commission of Wyoming v. Utah Construction Company, supra.* And, of course, a state is not a person subject to a Civil Rights suit. *Williams v. Eaton, supra.* I observe that the State of Utah is not involved directly in this action. Because that State is not a *person* subject to suit relating to Smith' claimed deprivations, *I suggest that there is no constitutional authority whereby the State of Utah or any of its subdivisions or agencies may permissibly protect, either directly from the public treasury or via premiums for insurance coverage, any of the defendants-appellants from the subject damage judgment awards. Losee, Barnum and Peterson must pay Smith from their personal assets. The prospect is frightening to me . . .*" 485 F.2d at 349. (emphasis supplied.)

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"The risk of personal judgments in the exercise of discretion relative to contract tenure and renewal confronting persons serving in administrative positions such as appellants Losee, Barnum and Peterson will almost certainly guarantee one result: Henceforth those in like positions shall not recommend against tenure or contract nonrenewal regardless of their good faith beliefs otherwise. They simply cannot afford to be wrong when error hits their pocketbooks personally. Such a result does not speak well for the future of our system. I must acknowledge that my concern relates to many officials serving in areas other than education." *Ibid* at 350.

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"The majority opinion recognizes that there is little precedent for money damage judgments arising out of Civil Rights suits. Most of the relief granted is in the nature of injunctive or declaratory relief. A close examination of the *reported damage judgment award cases conveys a clear impression that the condemned acts were malicious in nature and performed in reckless and wanton disregard*

for the known rights of others. A person acting so abusively is not entitled to any immunity or privilege from a money judgment award. Such acts are maliciously motivated. . . . I see no justification for application of any less stringent standard of proof against the defendants-appellants in the case at bar." Ibid at 345 (emphasis supplied).

See also the following cases not involving school officials. *Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973):

> "Thus, while a § 1983 action for money damages may be maintained against such officials (the 'selectmen' of Randolph, Massachusetts), plaintiffs have the obligation to sufficiently allege and prove that defendant's conduct was either 'purposefully discriminatory,' *Harrison v. Brooks*, 446 F.2d 404 (1st Cir. 1971), 'knowing or reckless,' or 'willful,' *Ka-Haar, Inc. v. Huck*, 345 F. Supp. 54 (E.D. Wisc. 1972)." 488 F.2d at 1250-51.

John v. Hurt, 489 F.2d 786 (7th Cir. 1973):

> "Although it may be established under the pleadings that defendant made gross errors of judgment, we note that there is no allegation that his conduct was intentionally harmful to plaintiff, or otherwise deliberately inconsistent with his obligations to plaintiff so as to be a voluntary excursion outside the scope of his duties. See *Hilliard v. Williams*, 465 F.2d 1212, 1218 (6th Cir. 1972), cert. denied 409 U.S. 1029, 34 L.Ed.2d 322." 489 F.2d at 788.

It should be noted that although *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) held that § 1983 does not by its terms require proof of specific intent to deprive one of his civil rights, that holding has not dispensed with the necessity, in connection with an inquiry into the proper content of the immunity defense, to inquire into a public official defend-

ant's state of mind. See *Jannetta v. Cole*, 493 F.2d 1334 (4th Cir. 1974):

> ". . . while there is nothing in § 1983 or the Fourteenth Amendment to suggest that an improper motive is requisite for a federal cause of action, conscientious state officials, when acting reasonably and in good faith, should not be expected to answer in money damages for failure to accurately predict the future course of constitutional doctrine, even though such failure may entitle a plaintiff to equitable relief." 493 F.2d at 1338.

See also *Kirstein v. Rector*, 309 F. Supp. 184 (E.D. Va. 1970) and *Tinker v. Des Moines Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L. Ed. 2d 731 (1969), where in his dissenting opinion Mr. Justice Harlan stated that public school students should be required to prove that the action of school officials was "motivated by other than legitimate school concerns." 393 U.S. at 526.

It is submitted that courts which pose the question of whether a "good faith" test should be "subjective" or "objective" obfuscate the real issue. Those opting for the "objective" criterion, as did the Court of Appeals in this case (See also *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968)) are actually exposing school officials to financial liability where they make "wrong" decisions, since they equate successful assertion of the immunity defense to a successful defense on the merits[17]—that is seemingly no immunity at all. On the other hand, cases prescribing a subjective good faith criterion seem to be utilizing a

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[17] *McLaughlin v. Tilendis*, 398 F.2d at 352:

> "At best, defendants' qualified immunity in this case means that they can prevail only if they show that plaintiffs were discharged on justifiable grounds. Thus here a successful defense on the merits merges with a successful defense under the immunity doctrine."

"malice" test but without the clarity which could be accomplished by expression of the test *as* one of malice. *Gaffney v. Silk*, 488 F.2d 1248 (1st Cir. 1973).[18]

This Court should accord school officials sued in their individual capacities an absolute immunity for discretionary acts within the scope of their duties or responsibilities. In the alternative, in order to provide such officials a reasonably coherent and intelligible standard by which the legality of their conduct will be judged, this Court should grant immunity to acts within the scope of their official authority, so long as the acts are done without malice.

CONCLUSION

Petitioners contend that the decision of the Court of Appeals for the Eighth Circuit should be reversed insofar as it found a violation of the students' rights of substantive due process and afforded such students an opportunity to recover money damages against them. The Complaint should be dismissed.

Respectfully submitted

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[18] ". . . it is the clear rule in this Circuit that liability will attach only where 'the defendants subjectively realized [that their action] would result in depriving the plaintiff of a right or privilege secured by the Constitution of the United States.' *Cobb v. City of Maulden*, 202 F.2d 701 (1st Cir. 1953)." 488 F.2d at 1251.